89-213

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA
Petitioner

V.

INOCENCIO MUNIZ,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA
MIDDLE DISTRICT

J. MICHAEL EAKIN
DISTRICT ATTORNEY
ATTORNEY FOR PETITIONER

CUMBERLAND COUNTY COURTHOUSE
SOUTH HANOVER STREET
CARLISLE, PENNSYLVANIA 17013
PHONE: (717) 240-6210

64 pp

QUESTIONS PRESENTED

I. ARE STATEMENTS INCIDENT TO FIELD SOBRIETY TESTING WHICH DEMONSTRATE ONE'S PHYSICAL ABILITY TO SPEAK DEMONSTRATIVE RATHER THAN TESTIMONIAL IN NATURE SUCH THAT MIRANDA WARNINGS NEED NOT BE GIVEN PRIOR TO OBTAINING THEM?

II. IS INSTRUCTIONAL ADVICE GIVEN TO AN INDIVIDUAL DURING FIELD SOBRIETY TESTING "INTERROGATION" WITHIN THE PURVIEW OF THE MIRANDA DOCTRINE?

TABLE OF CONTENTS

TABLE OF CONTENTS, Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES, Continued

TABLE OF AUTHORITIES, Continued

PRAYER

Petitioner, the Commonwealth of Pennsylvania, respectfully requests that a Writ of Certiorari issue to review the Judgment and Opinion of the Superior Court of Pennsylvania, authored by President Judge Cirillo, entered in this case on September 8, 1988, review of which was denied by the Pennsylvania Supreme Court by Order dated May 10, 1989.

OPINIONS BELOW AND JURISDICTION

The trial court's Judgment of Sentence is attached hereto as Appendix D. The trial court's Opinion and Order denying defendant's Motion for a New Trial and in Arrest of Judgment is attached hereto as Appendix C.

The Judgment and Opinion of the Superior Court of Pennsylvania, which reversed the decision of the trial court and remanded for proceedings consistent with its Opinion, is reported at ____ Pa Super. _____, 547 A.2d 419 (1988). That Opinion was handed down on September 8, 1988, and is attached hereto as Appendix B. The Supreme Court of Pennsylvania denied the Commonwealth's Petition for Allowance of Appeal in an unreported Order dated May 10, 1989, and docketed at No. 249 M.D. Allocatur Docket, 1988. That Order is attached hereto as Appendix A.

The jurisdiction of this Court to review the Judgment and Opinion of the Superior Court of Pennsylvania, Middle District, is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution, Amendment 5, which provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

After a non-jury trial before the Honorable George E. Hoffer on May 20, 1987, the defendant, Inocencio Muniz, was found guilty of driving under the influence in violation of 75 Pa.C.S.A. §3731. Defendant's post-trial motions were denied. Having been previously convicted of driving under the influence in 1985, he was sentenced to imprisonment for not less than 45 days nor more than 23 months. Defendant's conviction was reversed by the Superior Court of Pennsylvania in an opinion filed September 8, 1988.

The defendant's conviction stems from an incident which took place on November 30, 1986. In the early morning hours, Officer David Spotts of the Upper Allen Township Police Department noticed the defendant's vehicle, with hazard lights flashing, stopped on the berm of Route 15.

Upon reaching the vehicle and speaking with the defendant, the officer noticed a strong odor of alcohol on the defendant's breath. The defendant's eyes were bloodshot, and his coordination skills were poor.

Believing the defendant was intoxicated, Officer Spotts advised him to remain on the berm until he was sober and not to attempt to drive at that time. The defendant orally agreed to the officer's request, but before the officer had time to return to his own vehicle, the defendant pulled back onto the highway and proceeded to drive away. The defendant was subsequently pulled over by the same officer, who asked for the defendant's license and registration. After producing other documents, the defendant managed to provide the officer with the requested information. The defendant failed several field sobriety tests, was placed under arrest, and was transported to the Central Booking Center.

The Booking Center routinely videotapes defendant who have been arrested for driving under the influence so that a permanent record of their condition will be preserved for trial. In accordance with that policy, the defendant was videotaped answering routine questions and taking sobriety tests. The defendant refused to submit to a breathalyzer test.

In reversing the Judgment of Sentence, the Superior Court applied its rationale in Commonwealth v. Bruder, 365 Pa. Super. 106, 528 A.2d 1385 (1987) allocatur denied, 518 Pa. 635, 542 A.2d 1365, reversed, Pennsylvania v. Bruder, _____ U.S. _____, 57 U.S.L.W. 3311 (1988) (recitation of the alphabet was communicative in nature); Commonwealth v. Conway, 368 Pa. Super. 488, 534 A.2d 541 (1987) allocatur denied, _____ Pa. _____, 549 A.2d 914 (1988) (defendant's requests for clarification of instructions to field sobriety tests were communicative in nature);

Commonwealth v. Waggoner, 373 Pa. Super. 23, 540 A.2d 280 (1988), allocatur denied, No. E.D. Allocatur Docket 1988 (October 19, 1988) (entire audio portion of videotape should have been suppressed absent valid waiver of Miranda rights). The Superior Court concluded that the entire audio portion of the videotape in this case constituted compelled testimony evidence which was elicited before the defendant received Miranda warnings. Finding the evidence should have been excluded, and that the defendant was prejudiced by its admission, the case was reversed and remanded for a new trial.

The Commonwealth filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court. That petition was denied by Order entered May 10, 1989.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION DOES NOT REQUIRE THAT MIRANDA WARNINGS BE GIVEN PRIOR TO OBTAINING STATEMENTS INCIDENT TO FIELD SOBRIETY TESTING WHICH DEMONSTRATE ONE'S PHYSICAL ABILITY TO SPEAK BECAUSE THOSE VOICE EXEMPLARS ARE DEMONSTRATIVE RATHER THAN TESTIMONIAL IN NATURE.

In the instant case, the defendant was videotaped during processing after his arrest for driving under the influence of alcohol. The videotape was part of the routine procedure. As part of processing, the defendant was asked to calculate the date of his sixth birthday, he was asked to count a series of numbers during field sobriety testing, and he was asked if he understood the instructions he was being given. Finally, he was asked if he understood the Implied Consent Law as it related to his right to refuse a

breathalyzer test. The Superior Court of Pennsylvania held that the audio portion of the videotape should have been suppressed because these were testimonial utterances compelled in violation of the Fifth Amendment of the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution.[1]

In reaching its decision in the instant case, the Pennsylvania Superior Court relied on its own rationale in Commonwealth v. Waggoner, 373 Pa. Super. 23, 540 A.2d 280, (1988), allocatur denied, No. 444 E.D. Allocatur Docket 1988 (October 19, 1988); Commonwealth v. Conway, 368 Pa. Super. 488, 534 A.2d 541 (1987), allocatur denied, _____ Pa. _____, 549 A.2d 914;

---

[1] The Court decided that Article I, Section 9 of the Pennsylvania Constitution offers protection identical to that afforded by the Fifth Amendment of the Federal Constitution. Hence, this Court's interpretation of the federal protections controls the outcome of this case. Appendix B at B4.

Commonwealth v. Bruder, 365 Pa. Super. 106, 528 A.2d 1385 (1987), allocatur denied, 518 Pa. 635, 542 A.2d 1365, reversed Pennsylvania v. Bruder, _____ U.S. _____, 57 U.S.L.W. 3311 (1988). The Superior Court decided that the result in the instant case is controlled by its previous conclusions in Bruder and Conway that evidence of a defendant's inability to recite the alphabet and the videotaped evidence of a DUI defendant's conduct are communicative rather than demonstrative evidence. The Superior Court has continued to follow this line of reasoning in subsequent cases. See, Commonwealth v. Peth, 374 Pa. Super. 265, 542 A.2d 1015 (1988), and Commonwealth v. Thompson, _____ Pa. Super. _____, 547 A.2d 1223 (1988).

The Pennsylvania Supreme Court has consistently denied allocatur, refusing to correct the Superior Court's repeated error.

The Superior Court panels have cited no authority for the legal conclusion that asking a person to demonstrate his physical ability to speak is testimonial in nature and thereby encompassed within the protections of the Fifth Amendment. Likewise, the panels have not cited any basis for deviating from the contrary conclusion reached by other state courts who have held that statements incident to physical coordination tests including the recitation of the alphabet or the counting of numbers are not testimonial

evidence within the purview of the Fifth Amendment.[2]

This Court has previously held that the use of a defendant's voice as an identifying physical characteristic for the purpose of evaluating the physical properties of that voice does not violate the defendant's Fifth Amendment rights. United States v. Dionisio, 410 U.S. 1 (1973); United States v. Wade, 388 U.S. 218 (1967).

---

[2] Palmer v. State, 604 P.2d 1106 (Alaska 1979); Lanford v. People, 159 Colo. 36, 409 P.2d 829 (1966); Oxholm v. District of Columbia, 464 A.2d 113 (D.C. App. 1983); State v. Mannion, 414 N.W.2d 119 (Iowa 1987) (dictum); Commonwealth v. Mahoney, 400 Mass. 524, 510 N.E.2d 759 (1987); People v. Burhans, 166 Mich. App. 758, 421 N.W.2d 285 (1988); State v. Breeden, 374 N.W.2d 560 (Minn. Ct. App. 1985); State v. Finley, 173 Mont. 162, 566 P.2d 1119 (1977); State v. Bottomly, 208 N.J. Super. 82, 504 A.2d 1223 (Law Div. 1984), aff'd, 209 N.J. Super. 23, 506 A.2d 1237 (App. Div. 1986); Piqua v. Hinger, 15 Ohio St.2d 110, 238 N.E.2d 766, cert. denied, 393 U.S. 1001 (1968); State v. Roadifer, 346 N.W.2d 438 (S.D. 1984); State v. Haefer, 110 Wis.2d 381, 328 N.W.2d 894 (Ct. App. 1982); Annot. 41 A.L.R. 812 §16 at 848-55 and cases cited therein. Cf. State v. Palmer, 206 Conn. 40, 536 A.2d 936 (1988); Macias v. State, 515 So.2d 206 (Fla. 1987).

There is nothing substantively incriminating in counting a sequence of numbers or in other conversation incident to the videotaping process.

This case squarely presents the issue recognized but not reached by this Court in Pennsylvania v. Bruder, _____ U.S. _____, _____, n.3 57 U.S.L.W. 311, 311 n.3 (1988) (reversing the Opinion of Cirillo, P.J.) ("We do not reach the issue of whether recitation of the alphabet in response to custodial questioning is testimonial and hence admissible under Miranda v. Arizona, 384 U.S. 436 (1966).); and in South Dakota v. Neville, 459 U.S. 553 (1983) concerning "the distinction between real or physical evidence,

on the one hand, and communications or testimony, on the other [hand]....Id, at 561.[3]

A defendant's recitation of identifying information is circumstantial, non-testimonial evidence. As was so cogently expressed by the Honorable Robert S. Gawthrop, III, in his Opinion denying defendant's Post-Trial Motions in Waggoner, if the identifying information was being utilized to prove the truth of that information, then it would be testimonial. However, "when it is merely offered to show the manner of speech, the lack of muscular coordination of tongue and mouth, it is nothing more than the spoken equivalent of the straight line defendants are often commanded to walk, heel-to-toe, during the

---

[3] At the time of its decision, the Superior Court of Pennsylvania did not have the benefit of this Court's most recent discussion of the issue in which this Court concluded that "in order to be testimonial, an accused's communication must itself, explicitly or implicity, relate a factual assertion or disclose information." Doe v. United States, 487 U.S. _____, _____, 108 S.Ct. 2341, 2347, 101 L.Ed.2d 184, 197 (1988) (footnote omitted).

administration of so-called field testing of their muscular coordination of their legs and torso, rather than of their lips and tongue." Opinion of the Court, Commonwealth v. Waggoner, No. 2070-86 Court of Common Pleas, Chester County, Pennsylvania, at p. 7 (June 9, 1987).

In the context of driving under the influence cases, determining the borderline between testimonial and non-testimonial utterances presents an issue of profound public importance worthy of this Court's review. Now that DUI defendants throughout the country are routinely videotaped during processing and sobriety testing, the distinction between voice exemplars and compelled testimonial utterances is a substantial issue; it is also one which has yet to be considered by this Court. This Court's resolution of the issue will have a significant impact on the processing and prosecution of defendant's charged with driving under the influence, and law

enforcement officials are in need of this Court's definitive resolution of the issue. This Court should grant certiorari to resolve the conflict between the Superior Court of Pennsylvania's holding and the overwhelming weight of constitutional authority throughout the country to the contrary.

II. INSTRUCTIONAL ADVICE GIVEN TO AN INDIVIDUAL DURING FIELD SOBRIETY TESTING IS NOT "INTERROGATION" WITHIN THE PURVIEW OF THE MIRANDA DOCTRINE.

In the instant case, the Superior Court of Pennsylvania concluded the audio portion of the defendant's videotaped performance at the Booking Center should have been excluded as evidence because it contained responses and communications elicited from the defendant before he received Miranda warnings. Miranda warnings are not required unless a defendant is subjected to custodial interrogation. Although this defendant was in

custody, he was not subject to interrogation as that term is defined by law.

A defendant's statements are not the product of interrogation unless those statements were made in response to police conduct likely or expected to elicit a confession or other incriminating statement. This court has defined interrogation to encompass "words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301 (1980). On the other hand, "[i]n the context of an arrest for driving while intoxicated, a police inquiry of whether the suspect will take a blood alcohol test is not an interrogation within the meaning of Miranda [since] police words or actions normally attendant to arrest and custody do not constitute interrogation." South Dakota v. Neville, 459 U.S. 553, 564 n.15 (1983).

Upon arrival at the Booking Center, and prior to being advised of his constitutional rights, the defendant in this case was asked a series of questions including his address, height, weight, color of eyes, date of birth, age and the date of his sixth birthday. Thereafter, defendant was asked to perform several field sobriety tests. During the course of testing, the defendant was asked whether or not he understood the instructions. Finally, prior to his Miranda warnings, defendant was informed of the Implied Consent Law.[4] After making several inquiries about its content, defendant acknowledged he understood it. Thereafter, the defendant stated he recently finished serving a license suspension and did not want his license suspended again.

---

[4] Individuals driving on the roadways of Pennsylvania are statutorily deemed to have impliedly consented to undergo chemical testing to determine their blood alcohol content. 75 Pa.C.S. §1547.

Police conversation with the defendant during the initial routine questioning was not interrogation. All of the questions, except the date of his sixth birthday, were to obtain identifying information necessary to book the defendant. The questions were not designed to elicit any substantively incriminating response. Therefore, Miranda warnings were not required. Even the question concerning defendant's sixth birthday was not designed to obtain testimonial evidence. Rather, its purpose was to obtain demonstrative, circumstantial evidence of defendant's physical condition. In other words, the question was not designed to obtain evidence which would be used to prove the truth of the matter asserted, i.e. the date of defendant's sixth birthday, but to demonstrate his inability to calculate that date. The question asked the defendant to demonstrate the physiological functioning of his brain in much the same way as other sobriety tests demonstrated the functioning of

his motor skills. As discussed previously, that type of communication is truly demonstrative rather than testimonial in nature and should not come within the purview of the Fifth Amendment.

During the second phase of the videotaping process, the defendant was asked to perform field sobriety tests. The videotape contains defendant's questions about how to perform the sobriety tests. Police conversation during the testing was merely to instruct defendant concerning performance of the tests and to determine whether the defendant understood the instructions. Again, these questions were not designed to provoke substantively incriminating responses, but, rather, were for the defendant's benefit. The questions kept the booking agents from erroneously concluding the defendant's intoxication prevented him from performing tests when his poor performance was actually the result of his inability to understand the instructions. The propriety of the

questioning in this case is accentuated by the fact that english was defendant's second language. It was, therefore, eminently reasonable for the booking agents to ascertain the defendant's understanding of the instructions. The decision of the court below is in conflict with other state courts which have concluded that similar police conduct does not constitute interrogation.[5]

During the final stage of the videotaping, the defendant was advised of the Implied Consent Law and asked to take a breathalyzer test. After the Implied Consent Law was explained to the defendant, he was asked if he understood the law. After making several inquiries as to its content, he said that he did. Like the conversation during

---

[5] Palmer v. State, 604 P.2d 1106 (Alaska 1979); Commonwealth v. Mahoney, 400 Mass. 524, 510 N.E.2d 759 (1987); People v. Burhans, 166 Mich. App. 758, 421 N.W.2d 285 (1988); People v. Jacquin, 71 N.Y.2d 825, 522 N.E.2d 1026, 527 N.Y.S.2d 728 (1988). Contra, Jones v. State, 745 S.W.2d 94 (Tex. Ct. App. 1988) (Discretionary review granted April 27, 1988) (submitted on briefs October 12, 1988).

sobriety testing, the booking agent's conversation with the defendant during this portion of the processing was not contact calculated to evoke admissions. If the defendant failed to understand the Implied Consent Law, he could not intelligently refuse to submit to the breathalyzer test. It is absurd to think that the police cannot ask a person if he understands the law without violating his Miranda rights. In order to help the defendant realize his rights and obligations, the police must ascertain whether he requires further or repeated instructions. Inasmuch as the booking agent's questions were not calculated to, expected to, or likely to evoke incriminating statements from the defendant, Miranda warnings were not required.

It was error for the Superior Court to conclude the entire audio portion of the videotape should have been suppressed when the defendant's statements were not the product of interrogation. Discretionary review should be granted to provide guidance to law enforcement

personnel as to the relationship of this necessary investigative procedure to the Innis and Neville standards. Moreover, this case is the perfect vehicle for resolution of the issue because the facts are succinct and the issues straightforward.

CONCLUSION

For all the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests this Petition for Writ of Certiorari be granted as to all questions presented.

Respectfully submitted,

J. Michael Eakin
District Attorney
Cumberland County Courthouse
South Hanover Street
Carlisle, PA 17013
(717) 240-6210

APPENDIX A

Supreme Court of Pennsylvania

Middle District

Mildred E. Williamson
Deputy Prothonotary

434 Main Capitol Building
P.O. Box 624
Harrisburg, Pennsylvania 17108
(717) 787-6181

May 12, 1989

Syndi L. Norris, Esquire
Office of the District Attorney
Cumberland County Courthouse
Hanover Street
Carlisle, PA 17013

Re: Commonwealth, Petitioner
v. Inocencio Muniz
No. 249 M.D. Allocatur Dk. 1988

Dear Counsel:

This is to advise that the following Order has been entered for the above-captioned matter:

ORDER

"May 10, 1989,

Petition Denied

s/Per Curiam."

Very truly yours,
/s/ M. E. Williamson
Mildred E. Williamson
Deputy Prothonotary

MEW/pam

cc: Hon. George E. Hoffer - Cumberland County
Richard F. Maffett, jr., Esquire
Clerk of Courts - Cumberland County
[No. 172 Crim. 1987]

APPENDIX B

J. 57023/88

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
VS.	:	
INOCENCIO MUNIZ, Appellant	:	No. 00157 Harrisburg 1988

Appeal from the Judgment of Sentence February 2, 1988 in the Court of Common Pleas of Cumberland County, Criminal, No. 172 Criminal 1987.

BEFORE: CIRILLO, P.J. and OLSZEWSKI and MONTEMURO, JJ.

OPINION BY CIRILLO, P.J.:

Filed: September 8, 1988

This is an appeal from a judgment of sentence entered by the Court of Common Pleas of Cumberland County following Inocencio Muniz's conviction for driving under the influence of alcohol. We reverse.

While on routine patrol in the early morning hours of November 30, 1986, Officer David Spotts of the Upper Allen Township Police Department observed a vehicle positioned on the northbound berm of U.S. Route 15. The vehicle was parked with its

engine running, and the driver had activated its emergency flashers. Believing it to be a disabled vehicle, Officer Spotts stopped to offer assistance.

Officer Spotts's investigation revealed two individuals in the front seat of the vehicle, the driver being later identified as Inocencio Muniz. When the patrolman asked if he could be of assistance, Muniz replied that he had merely stopped to urinate. At that point Officer Spotts detected a strong odor of alcohol emanating from Muniz's breath. He also observed that Muniz's eyes were glazed and bloodshot, his face appeared flushed, and he exhibited a rather poor command of his coordination skills. Officer Spotts then directed Muniz and his passenger to remain along the roadside until he was in a condition to operate his vehicle safely. Muniz readily acknowledged this request, and assured the officer that he would remain along the berm until he could drive safely.

As Officer Spotts was returning to his cruiser, he heard Muniz's vehicle start to pull away from the berm of the road and continue along Route 15. The patrolman quickly got back into his cruiser and pursued the errant motorist approximately one-half mile down the road where he activated his warning lights and pulled Muniz over. The officer then requested Muniz's license and registration cards. Muniz fumbled through his wallet, dropping several cards, and eventually gave the police officer his Social Security card and his U.S. Department of Agriculture farm labor card. After a second request, Muniz produced the proper identification. Officer Spotts then asked Muniz to step out of his automobile to perform several field sobriety tests.

Muniz was administered three commonly utilized field sobriety tests: the horizontal gaze nystagmus test, the "walk and turn" test, and finally, the "one leg stand" test. Muniz failed each of these tests.

During the field sobriety tests, Muniz readily admitted that he had been drinking, that he was drunk, and that he could not perform the various tasks required because he was too inebriated. Muniz was then arrested and transported to the West Shore facility of the Cumberland County Central Booking Center for processing. During the course of the processing at the Booking Center, Lisa Deyo, a caseworker at the center explained the Implied Consent Law, 75 Pa.C.S. §1547. Muniz nevertheless refused to submit to an Intoxilyzer 5000 breath test. As standard operating procedure at the Booking Center, Muniz was videotaped during his processing and later issued his Miranda warnings.

On May 20, 1987, Muniz was tried at a bench trial before the Honorable George Hoffer in the Court of Common Pleas of Cumberland County and convicted of driving while under the influence of alcohol, 75 Pa.C.S. §3731(a)(1). Post-trial motions were filed and denied by the court.

Having been previously convicted of driving under the influence in 1985, Muniz was then sentenced to pay the costs of prosecution, a $310.00 fine, and to undergo mandatory imprisonment in the Cumberland County prison for a period of not less than forty-five days nor more than twenty-three months. This appeal followed.

Muniz advances the following three issues for our review: (1) whether the trial court erred by refusing to suppress videotaped statements made by him prior to being advised of his constitutional rights; (2) whether trial counsel was ineffective for failing to object to or challenge his defective jury trial waiver colloquy; and (3) whether trial counsel was ineffective for failing to properly object to the admission of evidence concerning the horizontal gaze nystagmus field sobriety tests.

Muniz first claims that the trial court erred in failing to suppress the statements appearing on the videotaped portion

of his processing at the Booking Center. He maintains that the videotape reflects that, prior to being advised of his constitutional rights, he was asked a series of questions including his address, height, weight, color of eyes, date of birth, age, and the date of his sixth birthday. He also avers that, prior to his Miranda warnings, he was informed of the Implied Consent Law, and after making several inquiries about its content, acknowledged that he understood it. He thereafter informed the Booking Center authorities that he had recently finished serving a license suspension and did not want it suspended again. All of these communications to the police, he alleges, were testimonial in nature, and thus protected by his constitutional right against self-incrimination.

The fifth amendment of the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution protect each Pennsylvania citizen from being compelled to

be a witness against oneself in any criminal case. In Schmerber v. California, 384 U.S. 757 (1966), the Supreme Court proclaimed that this constitutional guarantee "protects an accused only from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature...." 384 U.S. at 761. Likewise, "Pennsylvania appellate courts have held that Article I, Section 9 of the Pennsylvania Constitution offers a protection against self-incrimination identical to that provided by the Fifth Amendment." Commonwealth v. Conway, ___ Pa. Super. _____, _____, 534 A.2d 541, 546 (1987).

To ensure that a suspect's constitutionally guaranteed right against self-incrimination is not abridged by the actions of overzealous law enforcement officials, the Supreme Court has directed that, prior to custodial interrogation, a suspect must be informed that "he has a right to remain silent, that any statement he does

make may be used against him, and that he has a right to the presence of an attorney, either retained or appointed." Miranda v. Arizona, 384 U.S. 436, 444-45 (1966). However, Miranda warnings need be given only when one is actually subjected to custodial interrogation. Id. at 444. "In Pennsylvania, 'custodial interrogation does not require that police make a formal arrest, nor that the police intend to make an arrest... Rather, the test of custodial interrogation is whether the individual believed his freedom of action is being restricted." Commonwealth v. Bruder, ____ Pa. Super. ____, ____ 528 A.2d 1385, 1387 (1987) (citations omitted). In the instant case, the record undeniably reflects that Muniz was in custody for purposes of Miranda when Officer Spotts arrested him after failing the three field sobriety tests. Accordingly, any testimonial or communicative statements elicited from Muniz following his arrest and before he received his Miranda warnings should have been suppressed for trial

purposes unless he effectuated a voluntary, knowing, and intelligent waiver of his rights.

Notwithstanding the above-referenced rule, not all aspects of a roadside custodial stop, and subsequent administration of field sobriety test, will be considered as testimonial or communicative and thus subject to suppression where Miranda warnings were not administered. In Commonwealth v. Benson, 280 Pa. Super. 20, 421 A.2d 383 (1980), we held that:

> Requiring a driver to perform physical tests or to take a breath analysis test does not violate the privilege against self-incrimination because the evidence procured is of a physical nature rather than testimonial, and therefore, no Miranda warnings are required.

280 Pa. Super. at 29, 421 A.2d at 387. Consequently, when Officer Spotts asked Muniz to submit to a field sobriety test, and later

perform these tests before the videotape camera, no Miranda warnings were required. Commonwealth v. Romesburg, 353 Pa. Super. 215, 509 A.2d 413 (1986). It is only when the physical nature of the tests begins to yield testimonial and communicative statements that the protections afforded by Miranda are invoked. Here, it is evident that the physical nature of Muniz's tests began to take on the attributes of testimonial statements when, prior to the issuance of his Miranda warnings, he was asked a variety of personal questions, to which he readily responded. During this time, he also made several inquiries concerning the import of the Implied Consent Law, and commented upon his state of inebriation and the probable legal implications of his actions. These verbalizations clearly fall within the protections afforded by the fifth amendment. Commonwealth v. Waggoner,

_____ Pa. Super. _____, 540 A.2d 280 (1988).

In Commonwealth v. Bruder,

_____ Pa. Super. _____, 528 A.2d 1385 (1987), we were confronted with a factual scenario wherein the appellant, Thomas Bruder, was stopped by a patrolman after the officer witnessed him pass through a red light. Upon observing the classic indicia of intoxication, the officer asked the suspect to walk a straight line and recite the alphabet. Miranda warnings had not been issued before the officer's request. The results of these tests were admitted into evidence at Bruder's trial. On appeal, Bruder argued that the recitation of the alphabet was communicative in nature, and that the results of this test should have been suppressed. We agreed and stated that:

> Although requiring Bruder to walk in a straight line was a physical test which need not have been preceded by Miranda warnings, we cannot readily reach the same conclusion regarding Bruder's

recitation of the alphabet. Whereas the constitutional protection against self-incrimination which Miranda was designed to protect does not encompass physical evidence, it does refer to testimonial evidence.... We view the recitation of the alphabet as essentially communicative in nature. Therefore, because the recitation was elicited before Bruder received his Miranda warnings, it should have been excluded as evidence.

_____ Pa. Super. _____, 528 A.2d at 1388. Similarly, in Commonwealth v. Conway, _____ Pa. Super. _____, 534 A.2d 541 (1987), we further expounded upon the "Bruder analysis" and determined that the trial court properly suppressed the audio portion of a videotape that contained the appellant, James Conway, performing field sobriety tests. Following his arrest for driving under the

influence of alcohol, Conway invoked his Miranda rights during a videotaped conversation with the authorities. Thereafter, he was filmed performing three sobriety tests. During these tests Conway conversed with the officer, often requesting further clarification of his instructions. As part of these tests, Conway was also compelled to balance himself on one leg and count from 1,001 to 1,030. He was also questioned as to the amount and type of alcohol that he consumed. Prior to trial, Conway moved to suppress various portions of the videotape, arguing that it violated his privilege against self-incrimination. The trial court granted the suppression motion and the Commonwealth appealed, claiming that the suppressed evidence was neither testimonial nor compelled, and therefore not protected by the privilege against self-incrimination. Finding to the contrary, Judge Montemuro opined:

> [Mr. Conway] was required to give more than physical evidence when he

demonstrated his physical coordination on the sobriety tests. The test procedure was structured so that [Mr. Conway] was compelled to reveal his thought processes by asking for clarification of some of the officer's instructions, and his statements in response thereto manifest his confusion. Because confusion is arguably a sign of intoxication, [Mr. Conway] was forced to incriminate himself by "communicating" his confusion while performing the tests.... That [Mr. Conway's] statements are communicative cannot be questioned in light of our conclusion [in Commonwealth v. Bruder] that Mr. Bruder's recitation of the alphabet was communicative. Mr. Bruder was told by the police exactly what to say while the content of [Mr. Conway's] statements was more

> within his volitional control. By seeking clarification of the police officer's instructions, [Mr. Conway] expressed his thought processes far more than did Mr. Bruder in his recitation. There is a greater communicative or testimonial aspect in [Mr. Conway's] statements than in Mr. Bruder's recitation.

_____ Pa. Super. at _____, 534 A.2d at 546-57.

As in Conway, we conclude that Mr. Muniz was subjected to questioning that elicited information revealing his thought processes rather than statistical information that is commonly committed to rote memorization. Our in-chambers review of Muniz's videotape discloses the commencement of proceedings at the Booking Center at 3:54 a.m. At 3:57 a.m., Jerry Hosterman, a processing officer, asked Muniz his name, address, height, weight, eye color, date of birth, current age, and the date of Muniz's

sixth birthday. When Muniz proved unable to calculate the date of his sixth birthday, Officer Hosterman administered the same three tests that Muniz performed for Officer Spotts alongside Route 15. During the entire course of these tests, Muniz attempted to explain his difficulties in performing the various tasks, and often requested further clarification of the tasks he was to perform. At approximately 4:18 a.m., Lisa Deyo, another worker at the center, read the Implied Consent Law to Muniz. After questioning Deyo in detail about its legal implications, Muniz declined to submit to the Intoxilyzer 5000 breath test. Afterwards, at 4:29 a.m., Muniz was issued his Miranda warnings for the first time since his arrest.

Although questions surrounding a persons height, weight and age are ostensibly requested for record-keeping purposes only, such a purpose cannot be inferred from the Booking Center's question requiring Muniz to calculate the date of his sixth birthday.

Moreover, the questions posited by Muniz during his on-camera physical sobriety tests are precisely the sort of testimonial evidence that we expressly protected in Conway. It is also critical to note that none of Muniz's utterances were spontaneous, voluntary verbalizations. Rather, they were clearly compelled by the questions and instructions presented to him during his detention at the Booking Center. Since the above-referenced responses and communications were elicited before Muniz received his Miranda warnings, they should have been excluded as evidence.

"In order to reverse on the basis of introduction of inadmissible evidence, we must find an abuse of discretion as well as a showing of actual prejudice resulting from the tainted evidence." Bruder, _____ Pa. Super. at _____, 528 A.2d at 1388 (citations omitted). Here, Muniz's videotaped responses were clearly prejudicial, and certainly led the finder of fact to infer that his confusion and failure to speak clearly indicated a state

of drunkenness that prohibited him from safely operating his vehicle. The absence of such evidence may very well have led to a different verdict. Accordingly, we conclude that Judge Hoffer abused his discretion in refusing to suppress the evidence, and consequently the case must be reversed and remanded for a new trial. Because of our disposition of Muniz's first allegation of error, we need not address his remaining two claims.

Reversed and remanded for proceedings consistent with this opinion. Jurisdiction is relinquished.

DISSENTING OPINION BY OLSZEWSKI, J.

DATED: September 8, 1988

JUDGMENT ENTERED

/s/Mildred E. Williamson
Deputy Prothonotary

J. 57023/88

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
INOCENCIO MUNIZ, Appellant	:	No. 157 Harrisburg 1988

Appeal from Judgment of Sentence February 2, 1988, in the Court of Common Pleas of Cumberland County, Criminal No. 172 Criminal 1987.

BEFORE: CIRILLO, P.J., and OLSZEWSKI and MONTEMURO, JJ.

DISSENTING OPINION BY OLSZEWSKI, J.:

FILED: September 8, 1988

While I agree wholeheartedly with Commonwealth v. Bruder, ____ Pa.Super.____, 528 A.2d 1385 (1987) and Commonwealth v. Conway, 368 Pa.Super. 488, 534 A.2d 541 (1987), that Miranda warnings must be given prior to custodial interrogation, I must respectfully dissent. As this Court stated in Bruder: "In order to reverse on the basis of introduction of inadmissible evidence, we must find an abuse of discretion as well as a showing of actual prejudice resulting from the

tainted evidence." Bruder, ____ Pa.Super. at _____, 528 A.2d at 1388. Instantly, I would find that the only inadmissible evidence was the police officer's request that appellant calculate the date of his sixth birthday and appellant's response thereto. Thus, I would find that appellant was not prejudiced by the introduction of inadmissible evidence since this was a non-jury trial and the trial judge was presented with enough evidence to convict appellant even without the tainted evidence.

Accordingly, I would affirm the judgment of sentence.

APPENDIX C

COMMONWEALTH	:	IN THE COURT OF COMMON
	:	PLEAS OF CUMBERLAND
	:	COUNTY, PENNSYLVANIA
	:	
	:	172 CRIMINAL 1987
V.	:	CHARGE: (A) DRIVING UNDER
	:	THE INFLUENCE
	:	(B) TURNING
	:	MOVEMENTS AND
	:	REQUIRED SIGNALS
	:	(SUMMARY)
INOCENCIO MUNIZ	:	AFFIANT: PTL. DAVID SPOTTS

IN RE: MOTION FOR NEW TRIAL
AND IN ARREST OF JUDGMENT

Before HOFFER, J. and BAYLEY, J.

ORDER OF COURT

AND NOW, October 29, 1987,

defendant's motions for a new trial and in arrest of judgment are DENIED. Upon completion of a short-form presentence investigation report by the Probation Office, the defendant is directed to appear for sentence at the call of the District Attorney.

By the Court,
/s/GEH
George E. Hoffer, J.

Edward Guido, Esquire
Assistant District Attorney
For the Commonwealth
Carl Stoner, Esquire
For the Defendant

COMMONWEALTH	:	IN THE COURT OF COMMON
	:	PLEAS OF CUMBERLAND
	:	COUNTY, PENNSYLVANIA
	:	
	:	172 CRIMINAL 1987
V.	:	CHARGE: (A) DRIVING UNDER
	:	THE INFLUENCE
	:	(B) TURNING
	:	MOVEMENTS AND
	:	REQUIRED SIGNALS
	:	(SUMMARY)
INOCENCIO MUNIZ	:	AFFIANT: PTL. DAVID SPOTTS

IN RE: MOTION FOR NEW TRIAL
AND IN ARREST OF JUDGMENT

Before HOFFER, J. and BAYLEY, J.

OPINION AND ORDER OF COURT

On May 20, 1987, following a nonjury trial, the defendant was found guilty to a count of Driving Under the Influence. At trial, over his objections, evidence was admitted as to defendant's performance of field sobriety tests, the videotape of the defendant, and responses made by defendant during the course of the videotaping, prior to the defendant's having been given his Miranda warnings. The defendant filed motions for a new trial and in arrest of judgment.

The test of the sufficiency of evidence to convict the defendant is whether, viewing all evidence admitted in a light most favorable to the Commonwealth, and drawing all reasonable inferences therefrom, it is sufficient to enable the trier of fact to find every element of the crime charged beyond a reasonable doubt. Commonwealth v. Litzerberger, 333 Pa. Superior Ct. 471, 482 A.2d 968 (1986).

On November 30, 1986, at approximately 2:50 a.m., a police officer of the Upper Allen Township Police Department, while patrolling on Route 15, noticed a vehicle stopped on the berm with its engine running and its four-way flashers activated. Thinking the vehicle disabled, he stopped behind the vehicle and approached it in order to offer assistance to the occupants. His investigation revealed two people in the front seat, one of whom was the defendant driver. While conversing with the defendant, the officer detected a strong odor of alcohol on

defendant's breath, noticed that his eyes were bloodshot and glazed, and that his face was flushed. In addition, the officer noticed that the defendant did not have good command of his coordination skills.

At that point, the officer warned the defendant twice to wait until he had sobered up before driving. Although the defendant had responded affirmatively to the officer's requests, the officer did not even reach his vehicle before hearing the defendant's vehicle start to pull onto the highway. The officer proceeded to follow the defendant and stopped him about a half-mile down the road. The officer asked the defendant to produce his license and registration cards; however, the defendant fumbled with his wallet, dropped a few cards and handed the officer the wrong identification. After a second request, the defendant located the proper identification. The defendant was then placed under arrest and transported to the West Shore facility of the

Cumberland County Central Booking Center for processing. While at the center, the defendant refused to submit to a breath test, all of which was routinely videotaped.

The defendant, in his post trial motions, raised several claims, some of which have been abandoned through lack of argument. The first was a boilerplate claim that the verdict was contrary to the evidence. Since no specifics are set forth, this claim must be dismissed. Commonwealth v. Beckham, 349 Pa. Super. 430, 503 A.2d 443 (1986). However, even on the merits, the evidence read in a light most favorable to the Commonwealth overwhelmingly proved beyond a reasonable doubt that defendant operated his vehicle while under the influence of alcohol to a degree which rendered him incapable of safe driving.

Lastly, the defendant seeks a new trial on the argument that the court erred in failing to suppress the testimony relating to the defendant's field sobriety tests, and the

videotape taken at the booking center, because they were incriminating and completed prior to the defendant's receiving his Miranda warnings. The answer is that it is well settled law in Pennsylvania that:

> requesting a driver, suspected of driving under the influence of alcohol, to perform physical tests or take a breath analysis does not violate [his] privilege against self-incrimination because [the] evidence procured is of a physical nature rather than testimonial, and therefore no Miranda warnings are required.

Commonwealth v. Benson, 280 Pa. Super. 20, 29, 421 A.2d 383, 387 (1980). See also Commonwealth v. Bruder, ___ Pa. Super. ___, 528 A.2d 1385 (1987). This would likewise hold true for the videotape of the defendant taken at the booking center, particularly where, as here, the defendant gave no incriminating statement; rather it was the defendant's actions that were incriminating.

For the foregoing reasons, the following Order of Court is entered:

ORDER OF COURT

AND NOW, October 29, 1987, defendant's motions for a new trial and in arrest of judgment are DENIED. Upon completion of a short-form presentence investigation report by the Probation Office, the defendant is directed to appear for sentence at the call of the District Attorney.

By the Court,

/s/ George E. Hoffer
George E. Hoffer, J.

Edward Guido, Esquire
Assistant District Attorney
For the Commonwealth

Carl Stoner, Esquire
For the Defendant

APPENDIX D

COMMONWEALTH	:	IN THE COURT OF COMMON
	:	PLEAS OF CUMBERLAND
	:	COUNTY, PENNSYLVANIA
	:	172 CRIMINAL 1987
VS	:	CHARGE: (A) DRIVING UNDER
	:	THE INFLUENCE
	:	(B) TURNING
	:	MOVEMENTS &
	:	REQUIRED SIGNALS
INOCENCIO MUNIZ	:	(Sum.)
OTN: B454590-3	:	AFFIANT: PTL. DAVID SPOTTS

IN RE: SENTENCE

ORDER OF COURT

AND NOW, February 2, 1988,

10:34 a.m., Inocencio Muniz, having appeared for sentence together with personal counsel, Carl B. Stoner, Jr., Esquire, and the court having received a presentence investigation report after the defendant's non-jury trial conviction (it appearing from the psi that this is a second offense for mandatory sentencing purposes but a third offense in actual fact), sentence of the court on Count A is that the defendant pay the costs of prosecution, that he pay a fine of $310, including $10 to the Emergency Relief Fund,

and that he undergo imprisonment in the Cumberland County Prison for a period of not less than 45 days nor more than 23 months.

Sentence of the court on Count B is that the defendant pay the costs of prosecution and a fine of $35, including $10 to the Emergency Relief Fund.

Upon the defendant's eventual parole, we direct the defendant to enter into a payment plan for the payment of the various sums due so that they can be paid within six months of today's date, that he enroll in, pay for and successfully complete the DUI school as run by the County, that he absolutely refrain from the use of alcohol and/or drugs during the period of this sentence, and that he submit to and pay for urine testing as directed and requested by the Probation Office, and that he complete such counseling as is directed by the Probation Office.

It appearing to the court that the defendant had filed post trial motions to our jury finding, bail shall be continued, with

the concurrence of the District Attorney, in that the defendant may continue to be released on his own recognizance pending appeal. Should no appeal be perfected within the time limits, the defendant is directed to immediately surrender himself to the Cumberland County Sheriff at the expiration of the appeal period.

The defendant is immediately directed to surrender his license to the Clerk of the Court for transmission to PennDOT for the appropriate period of suspension.

By the Court,

/s/GEH
George E. Hoffer, J.

Shawn C. Wagner, Esquire
Assistant District Attorney

Carl B. Stoner, Jr., Esquire
For the Defendant

CCP

:mtf